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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 892

D. D. DENNIS, ET AL.,
Petitioners,

vs.

J. E. MABEE, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Point A. The Circuit Court erred in affirming the District Court's judgment and erred in finding and holding that Dennis was, as a matter of law, an employee of the J. E. Mabee Company 15, 18, 19

Point B. The Circuit Court erred in affirming the judgment of the District Court and in finding and holding that:

"The evidence is clear that Halliburton's contract was merely to operate the mixing machines and that Halliburton had no further duties in connection with the undertaking. Its four employees were mere operatives of the two machines and the evidence

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as to the giving of any directions by Clark or some other employee of Halliburton is too vague and uncertain, but if any directions were so given, they were that of a volunteer and were without authority. It is shown clearly that Halliburton had nothing to do with the stacking of the sacks nor with the direction and control of the Plaintiff. For aught that appears the gesture made by Halliburton's employee was merely a voluntary act perhaps to point out the necessity of taking sacks from the top of the sack as a matter of safety. At any rate, it clearly appears that Halliburton had nothing to do with the creation of the dangerous condition alleged. The motion for directed verdict as to Halliburton was properly sustained." (Opinion, pp. 4-5) 15, 18, 46

Point C. The Circuit Court erred in affirming the judgment of the District Court and in holding that the situation with reference to how the mud was stacked was patent and obvious, and in effect holding that Dennis was guilty of contributory negligence as a matter of law proximately causing his injuries and, based upon such reasoning, further holding that there was no negligence shown in failing to furnish Dennis a safe place in which to perform his duties while upon the premises of Mabee's, when under the undisputed evidence Dennis was inexperienced, knew nothing of his danger, and had only worked some 15 or 20 minutes when the stack fell as the result either of Clark's negligent order or of Wylder's act in creating, with knowledge, a dangerous condition on Mabee's premises by ordering the mud to be stacked to a dangerous height without being cross-tied, since the above evidence created fact issues for the jury as to negligence and contributory negligence of the parties plaintiff and defendant, as well as proximate cause 16, 19, 47

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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioners, D. D. Dennis and Commercial Standard Insurance Company, respectfully show:

I.

Statement of Matter Involved

Your Petitioners, D. D. Dennis as plaintiff and the Commercial Standard Insurance Company as intervenor, brought suit under the common law for personal injuries and for subrogation against J. E. Mabee, L. E. Mabee, as individuals, and the J. E. Mabee Company, a business partnership, and Halliburton Oil Well Cementing Company, a corporation, in the United States District Court for the Western District of Texas. At the conclusion of all of the testimony the District Court sustained a motion for a directed verdict, and judgment was entered accordingly and an appeal was perfected to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana. That Court on December 10th, 1943, rendered an opinion affirming the judgment of the trial court and denied a rehearing of said cause on January 17, 1944.

The facts may be stated as follows: In drilling an oil well belonging to the Mabee's, a heavy flow of gas developed causing the well to blow out and it became necessary to shut off this gas in order that drilling for oil might continue. The Halliburton Oil Well Cementing Company, who specialize in this type of work, was engaged by Mabee as independent contractors to kill this well. Prior to the time that Halliburton arrived on the scene, the J. E. Mabee Company had employed Bill Eubanks as an independent contractor to select his own employees to *unstack Baroid*, and to carry it to the hopper in the course of the killing of the wild well, and Eubank

employees such as Dennis had nothing to do with the stacking of the mud. (R., pp. 134-135.)

Eubanks was an oil field contractor doing dirt work, pipe line work, employing his own employees and carrying compensation insurance upon them. (R., p. 134.)

While the Plaintiff, D. D. Dennis, who was hired and paid by Bill Eubanks, was unstacking the mud that had theretofore previously been stacked dangerously high, without the sacks being cross-tied to prevent them from falling, he was injured due to a portion of the stack collapsing and falling upon Dennis whereby Dennis sustained fourteen (14) undisputed fractures of the femur resulting in his total and permanent disability.

Eubanks, the independent contractor, testified that he was doing all of the lease work for Mabee at the time of Dennis' injuries, and for a period of some time prior thereto, and that he gave the orders himself to Dennis and the rest of the crew upon the occasion in question. (R., pp. 134-135.)

He further testified that when he carried his crew to the site of the wild well and when the Halliburton men got ready for the mud, that he had his men form in a circle so that they would keep out of each other's way and showed them how to perform the work which he had contracted to perform for Mabee. (R., p. 137.)

Following Dennis' injuries, he was treated for many months at the cost of the Commercial Standard Insurance Company, the compensation carrier of Eubanks, and they thereafter paid Dennis compensation. The evidence shows that while Dennis

was thus engaged in performing his work as an employee of the independent contractor, Eubanks, he was directed by one B. H. Clark to break the stack of mud in the middle, and that upon Dennis' attempting to break said stack as directed by Halliburton's foreman, Clark, the stack collapsed immediately. And Dennis further testified that it was due to the order of Clark, who directed him to go to the center of the stack and break the stack, that he went to that position. (R., pp. 70-71.)

The witness Mulkey, who as an employee of one John Marks had hauled the mud to the location and stacked it prior to the time that Eubanks' men came on the scene, testified that Bob Wylder, foreman for Mabee, instructed these men to stack the mud higher at a time when he, Wylder, knew that sacks of mud were already falling off. (R., p. 62.)

And Mulkey further testified that the stack was higher in the middle and that from his experience it was stacked much higher than was customary. (R., p. 63.) Mulkey further testified as an expert that the sacks should have been cross-tied, and that the effect of breaking a stack such as this one in the middle would be to cause it to fall. (R., pp. 63-64.)

The plaintiff alleged that he was a business invitee of the defendants and sought to recover as against Mabee by alleging that he was an employee of Bill Eubanks and while performing the work of his employer, who was the independent contractor of the Mabees, that the said Mabee Company owed him the duty of maintaining their premises in a reasonably safe condition, and that the acts of

Wylder, the Mabee foreman, in causing the mud to be stacked negligently at the dangerous height alleged, and without cross-tying them, constituted a breach of said duty proximately causing the injuries.

The plaintiff further alleged that the defendant Halliburton Oil Well Cementing Company, while performing said highly specialized service and working on said job, *owed plaintiff the duty of doing their portion of the work with reasonable care for his safety, and that the order of the said B. H. Clark was a negligent one and that it was due to the giving of said order that the sacks of mud fell in upon plaintiff and this was the basis of liability alleged as against Halliburton.*

The Circuit Court held in substance that plaintiff had no cause of action as against Mabee upon the theory that Dennis was a special employee of Mabee as a matter of law. The Circuit Court held that Halliburton had nothing to do with the creation of the dangerous condition alleged and that for aught that appears, the gesture made by Halliburton's employee was merely a voluntary act, and that the evidence was clear that Halliburton's contract was merely to operate the mixing machines and that the directions given were too vague and uncertain to permit a recovery.

Upon Motion for Rehearing, the Circuit Court said that there was no negligence on the part of defendants in failing to furnish the plaintiff with a safe place in which to do the work in question in that the situation was patent and obvious. Nothing further was said by the Court concerning their reasons for acquitting Halliburton of liability notwith-

standing the fact that the evidence quite clearly raised the issue, as hereinabove set out, that Dennis would not have been injured and that, indeed, the stack would never have fallen had it not been for the negligent order of Halliburton's foreman. This covers a brief statement of the matter involved.

II.

Jurisdiction

(a) The jurisdiction of the United States Supreme Court to review this cause for writ of certiorari is granted in Judicial Code, Sections 237 and 240, as amended by the Act of February 13, 1925, 28 U.S.C.A. 347(a).

(b) The judgment of the United States Circuit Court of Appeals, from which writ of certiorari is requested, was rendered on January 17th, 1944. This action is filed within the statutory time, being less than three months from the final order of the Court below, as is evidenced by the docketing and recording stamp of the Clerk of this Honorable Court.

(c) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and the said Circuit Court *has decided important questions* of local law in a manner in conflict with the decisions of the Texas Courts and the said Circuit Court has decided important questions of general law in a manner that is conflicting with the weight of authority, and the opinion of the Circuit Court constitutes such a departure

from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Wherefore, under Rule 38(5)(b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

III.

Principal Questions Involved

(a) Did the evidence in the case at bar raise a jury issue as to whether the plaintiff was an employee of the J. E. Mabee Company?

(b) If the jury had found that plaintiff was an employee of the J. E. Mabee Company, would the evidence be sufficient to show negligence upon the part of the J. E. Mabee Company proximately causing plaintiff's injuries?

(c) Irrespective of whether the plaintiff was an employee of the J. E. Mabee Company, did the evidence raise issues of actionable negligence as against the defendant Halliburton Oil Well Cementing Company?

IV.

Reasons Relied On for Allowance of the Writ

The decision of the Court below assumes facts as true, which were controverted by other facts in the record, in arriving at their conclusion that Dennis was a special employee of the J. E. Mabee Company,

which is a departure from fundamental and elementary law. The opinion of the Circuit Court with reference to the nonliability of Halliburton Oil Well Cementing Company is based upon a false assumption of the facts in that the order given was not vague and uncertain, and in that the evidence showed that Halliburton's foreman was acting within the course of his employment in giving the negligent order that resulted in Dennis' injury.

The opinion of the Circuit Court further assumes that the situation here was so patent and obvious that plaintiff, who had never before unstacked mud, should have realized the dangerous situation existing, contrary to well settled decisions in identical fact cases in Texas on said point; and the decisions of the Texas Courts with reference to this kind of matter are binding upon the Federal Courts.

That portion of the opinion which holds Dennis to be a special employee of the Mabees is not in accord with the decision of this Honorable Court in the case of *Standard Oil Company vs. Anderson*, 212 U. S. 480. It also conflicts with the decision of this Honorable Court in the case of *Hutt vs. Philadelphia Railway Company*, 252 U. S. 40.

The decision of the Circuit Court with reference to the question of Dennis' employment and the acts of Halliburton are so out of line with all of the great weight of authority on liability under the common law as to call for an exercise of this Court's power of supervision by the granting of this Writ by the correction of said opinion; all of which will be fully shown in the brief supporting this Petition.

WHEREFORE, Your Petitioners pray that a Writ of Certiorari issue under the seal of the Supreme Court of the United States, directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this cause numbered and entitled on the docket, No. 10569, D. D. Dennis, et al., Appellants versus J. E. Mabee Company, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated this 13 day of April, 1944.

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